(8)

No. 85-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SOLORIO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the fact that the victim is a military dependent, without more, sufficient "service connection" to support the exercise of court-martial jurisdiction over an off-base civilian-type offense?

2. Was the decision below, which found court-martial jurisdiction in circumstances in which previous decisions had refused to do so, a plain violation of the rule of Bouie v. City of Columbia, 378 U.S. 347 (1964)?

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Interest of the Amicus

The American Civil Liberties Union (ACLU) is a nationwide nonpartisan organization of more than 250,000 members dedicated to the protection of constitutional rights. The ACLU has long taken an interest in the administration of criminal justice in the military, in addition to its general interest in the vindication of constitutional rights in civilian state and federal courts. Thus, the ACLU regularly appears as an amicus curiae in the United States Court of Military Appeals in cases that affect all the services.[1]

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1. Petitioner and respondent have consented to the filing of this brief. Copies of their letters have been filed with the Clerk.

Summary of Argument

Under the service connection test of O'Callahan v. Parker, 395 U.S. 258 (1969), and Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971), military jurisdiction over an off-base civilian offense cannot be predicated solely on the fortuity that the victim is a military dependent. Reliance on that single factor would deprive a potentially large class of defendants of important protections that are available only in the civilian courts, and would lead to arbitrary results that would not contribute to public confidence in the military justice system.

While the question presented here arises in the context of a Coast Guard

court-martial, the decision below affects all of the military services. As of March 31, 1985, there were 2,147,845 persons in uniform in the Army, Navy, Marine Corps and Air Force, of whom 1,398,779 were on active duty in the 50 States. As of September 30, 1984, there were 2,851,392 military dependents, of whom 2,462,222 were living in the 50 States.[2]

These data do not include dependents of military retirees. A subsequent decision of the court below, United States v. Scott, 21 M.J. 345 (C.M.A. 1986), appears to expand military

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2. See generally Dep't of Defense, Defense '85 Almanac 24-27, 31 (Sept. 1985). During Fiscal Year 1984, 12,009 persons were convicted by general or special courts-martial. 1984 Ann. Rep. of Code Comm. on Military Justice (1985).

jurisdiction over off-base civil offenses (at least where the accused is an officer) to cases where the victim is a dependent of a retired military person even though the rule had long been that such offenses against retirees themselves were not subject to court-martial jurisdiction. United States v. Armes, 19 C.M.A. 15, 41 C.M.R. 15 (1969). Dependents of retired military personnel number in the millions.

Thus, the decision below signals a geometric increase in the pool of persons against whom civil offenses may give rise to military prosecution. It correspondingly extends the reach of military jurisdiction beyond anything heretofore contemplated or even arguably justified by military needs. Reversal is

required to restore military jurisdiction to its proper limits.

Reversal is also required because a new rule was applied to Solorio in violation of the ex post facto component of Fifth Amendment due process. Solorio's off-base misconduct was not punishable by court-martial prior to the decision in this case, and the fact that it may have violated state law is immaterial.

Argument

I.

THE VICTIM'S STATUS AS A MILITARY DEPENDENT IS INSUFFICIENT TO SUPPORT MILITARY JURISDICTION AND THE CORRESPONDING TRUNCATION OF SOLORIO'S CONSTITUTIONAL RIGHTS

In Toth v. Quarles, 350 U.S. 11, 22 (1955), this Court held that military tribunals should be restricted "to the

narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service." The decision below is irreconcilable with that exacting test.

The notion of service connection as a limitation on the jurisdiction of courts-martial was sound when it was announced in O'Callahan. It continues to be sound today. It is a notion that cannot be understood simply as the result of a weighing of the relative merits of the military and civilian systems of criminal justice. This is so because, notwithstanding O'Callahan's harsh assessment of the military justice system, 395 U.S. at 265-66, that decision is supported by constitutional considerations that would be present even

if all could agree that the substantive justice dispensed by the two systems were identical. These considerations include, first, the fundamental notion of civilian control of the military; second, the primacy of civilian authorities in general with respect to the maintenance of law and order within the country;[3] and third, the primacy of the States as regulators of individual conduct. The decision below simply disregards these important interests.[4]

The military and civilian

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3. See, e.g., Posse Comitatus Act, 18 U.S.C. sec. 1385 (1982).

4. In a very real sense, this is an a fortiori case for applying the service connection doctrine since the choice here is not between a federal court-martial and a federal civilian trial, as in O'Callahan, but rather between a federal court-martial and a state criminal trial.

criminal justice systems, however, are not comparable, much less identical. Although the Uniform Code of Military Justice ("UCMJ") has been amended several times since 1969, the changes wrought by Congress have not disturbed the basic arrangements that were in place when O'Callahan and Relford were handed down. It is of course to the good that this Court now has certiorari jurisdiction over at least some decisions of the Court of Military Appeals. 28 U.S.C. sec. 1259 (Supp. III 1985); UCMJ art. 67(h)(1), 10 U.S.C. sec. 867(h)(1) (Supp. III 1985). But other changes in the UCMJ can hardly be viewed as benefiting the accused. For example, the statutory right to request "reasonably available" counsel of one's own choice has been drastically narrowed by service regulations authorized under a

1981 amendment. See UCMJ art. 38(b)(7), 10 U.S.C. sec. 838(b)(7) (1982), added by Pub. L. No. 97-81, sec. 4(b), 95 Stat. 1088.

As in 1969, military defendants are still tried before judges who lack the minimal protection of a fixed term of office. Military juries still consist of as few as 3 or 5 members. Those jurors are still selected by commanding officers[5] and (except as to death sentences) need not be unanimous to reach a verdict. There is still no grand jury

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5. Section 3(b) of the Military Justice Act of 1983 permits the commander to delegate his power to excuse military jurors to legal counsel or any other principal assistant. UCMJ art. 25(e), 10 U.S.C. sec. 825(e) (Supp. III 1985). The change in no way insulates the selection process from command preferences.

or right to trial in the vicinage. Some of the armed services, in order to ensure zealous representation, have a separate command structure for defense counsel; others still do not.

Because the parties and other amici can be expected to review O'Callahan and Relford in some detail, we propose to focus on three points: (a) service connection approaches followed in other countries; (b) the proper limits of deference to military courts in deciding questions of service connection; and (c) the insubstantiality of the reasons adduced by the Court of Military Appeals for the vast expansion of court-martial jurisdiction represented by the decision below.

A.

The Experience Of Other Countries Teaches That A Service Connection Requirement Is Workable And Appropriate

Charting the appropriate boundary between military and civilian jurisdiction is a problem that has confronted other democracies.[6] Recognizing that such a boundary must be drawn does not, of course, imply a rejection of the legitimacy of the military justice system as an institution. While the process of

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6. Totalitarian governments do not recognize the problem. See, e.g., Statute on Military Tribunals art. 11(1), June 25, 1980, 1980 Vedemosti S.S.S.R., No. 27, item 546, reproduced in 4 Collected Legislation of the U.S.S.R. and Constituent Union Republics sec. VII-2 (W. Butler ed. 1983) and W. Butler, Basic Documents on the Soviet Legal System 166 (1983) (military courts given jurisdiction over all crimes by military personnel).

drawing the boundary necessarily involves a measure of imprecision, that process has worked reasonably well in this country. This Court can take some satisfaction from the fact that its decisions are consonant with the arrangements that have evolved in a number of other common law and noncommon law countries. Indeed, their persuasiveness has been been directly influential in at least one instance. There is no reason to abandon those decisions or to deviate from the sound principles accepted by democratic societies the world over with which we share fundamental values.

For example, although by statute British courts-martial have jurisdiction over civil offenses other than treason,

murder, manslaughter, treason-felony, rape, genocide and biological weapons violations,[7] service regulations and Home Office instructions set forth detailed criteria for determining whether offenses by service personnel will be tried in civilian courts or military courts. See 41 Halsbury's Laws of England para. 362, at 334 n.4 (1983). According to the Manual of Military Law, ch. 7, para. 4,

> . . . [t]he general principle is that an offence, whether committed on Ministry of Defence premises or not, which affects the person or property of a civilian should normally be dealt with by a civil court, but that an offence which involves only service personnel, their property or service property

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7. Army Act, 1955, 3 & 4 Eliz. 2, ch. 18, sec. 70(4); Air Force Act, 1955, 3 & 4 Eliz. 2, ch. 19, sec. 70(4).

should normally be dealt with by the military authorities. (Emphasis supplied.)

Implementing regulations add the following Relford-type factors for deciding whether a case should be tried in the civilian courts:

a. If the alleged offence is committed by a member of the forces who is about to be sent overseas, and particularly if there is reason to think it was committed in order to avoid such service, the police will normally hand the man over to the Service authorities unless it is a serious offence or one specifically excluded from the jurisdiction of the Service authorities or the circumstances are otherwise exceptional.

b. If the alleged offender was on duty at the time and the offence constituted a breach of that duty, the police will normally hand him over to the Service authorities even though the offence may affect the property of a civilian. This would not apply to a charge such as

dangerous driving which involves risk to the general public.

c. The Service authorities will generally deal with an offence committed by a member of the forces on Service premises, if it can be dealt with summarily, and was either a minor assault on a civilian or a minor offence against the property of a civilian.

d. If a Service offender has a civilian accomplice, proceedings against both will normally be taken in a civil court.

e. If the alleged offender is already the subject of a suspended sentence ('deferred sentence' in Scotland), a probation order, an order for conditional discharge or some other form of binding over by a civil court, any further offence will be required to be brought to the notice of the civil authorities, notwithstanding that it would otherwise normally be dealt with by the Service authorities. Queen's Regulations para. J7.007.

An even stricter rule of service

connection obtains in Scotland. "An offence committed in Scotland by a member of the forces while on duty or on Service premises which affects the person or property of a civilian will normally be dealt with by the procurator fiscal in the civil court notwithstanding" paragraphs b. and c. quoted above. Id. para. J7.012a.

A similar approach--the roots of which may be traced, at least in part, directly to O'Callahan[8]--is followed in Canada, where "military authorities . . . claim that they have been applying a concept of service connection for years

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8. See R. v. MacEachern, 63 Nat'l Rptr. 59, 61 (Can. Ct. Martial App. Ct. 1985); see also MacKay v. The Queen, 114 D.L.R.3d 393, 426 (1980) (McIntyre, J., concurring) (semble).

and that the O'Callahan test, were it adopted by a majority of the [Supreme Court of Canada], would have no practical effect."[9] To cite an illustration that bears some resemblance to the case at bar in the sense that it involves similar on-base and off-base misconduct, the Court Martial Appeal Court of Canada only last year held that there was no service connection over an off-base arson at a motel at which a serviceman stayed while enroute from one duty station to another, despite the fact that he had also committed arson at both his old and new duty stations. R. v. Catudal, 18 C.C.C.3d 189 (Ct. Martial App. Ct. 1985).

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9. Gold, Canadian Bill of Rights--Fair Hearing--Equality Before the Law--National Defence Act--Court-Martial Jurisdiction, 60 Can. B. Rev. 137, 144-45 n.36 (1982).

The same court, in MacEachern, supra, quoted with obvious approval from an able concurring opinion in MacKay, supra, as follows:

> . . . In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offenses and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of military courts to that extent. 114 D.L.R.3d at 424-25.

Nor are these simply isolated examples of the steps democratic countries have taken to guide the trial of civil offenses into the civilian

courts. Australia and New Zealand, for example, require the approval of their attorneys general before a court-martial may try charges of treason, murder, manslaughter, rape or bigamy committed within the country.[10] The attorney general of Israel has even broader powers: he may direct that any case be transferred where the offense was not committed within the framework of the defense force or in consequence of the accused's military status[11]--a test much like the one laid down in O'Callahan.

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10. Defense Force Discipline Act, 1982, sec. 63(1), 2 [1982] Austl. Acts P. 2124; Armed Forces Discipline Act, 1971, sec. 74, 3 [1974] N.Z. Stat. 1519.

11. Military Justice Law, 1955, sec. 14, Laws of Israel, No. 54, 184, 189 (1957).

The Philippine Articles of War, which were directly influenced by American legislation, permit court-martial jurisdiction for civil offenses only on military bases or if all victims were subject to military law.[12] In Pakistan, while there is no formal service connection requirement, exceptions are made to that country's otherwise sweeping grant of court-martial jurisdiction where the offenses, like those at issue here, relate to the "property or person of a civilian or are committed in conjunction with a civilian or if the civil authorities intimate a

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12. Art. of War 94, 2 Phil. Perm. & Gen. Stats. 246, 290 (G. Trinidad rev. ed. 1978).

13. Anwar, The Administration of Military Justice in the Pakistan Air Force, 61 Mil. L. Rev. 41, 54-55 & n.47 (1973).

desire to bring the case before a civil court."[13]

For its part, France in 1965 strictly limited peacetime domestic court-martial jurisdiction to military offenses and civil offenses occurring on base or incident to service.[14] As a practical matter, the French statute functions in much the same way as the service connection doctrine in this country.[15] While it provides considerably less guidance than

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14. Code de Justice Militaire art. 56, Loi No. 65-542, July 8, 1965, J.O. July 9, 1965, 2 [1965] Gaz. du Palais 44, 50, discussed in Ryker, The New French Code of Military Justice, 44 Mil. L. Rev. 71, 85 & n.63 (1969).

15. See generally P. Doll, Analyse et Commentaire du Code de Justice Militaire paras. 107-11, at 65-69 (1966) (collecting cases).

O'Callahan and Relford, the circumstances under which a French court-martial may try civil offenses have been described as well-defined.[16]

Finally, even countries not widely viewed as bastions of democracy have occasionally shown a sensitivity to the inappropriateness of trying civil offenses by court-martial. Thus, it appears that South Korean courts-martial have no jurisdiction over civil offenses,[17] and although South African courts-martial have concurrent jurisdiction over all but a handful of

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16. Ropers, Le Nouveau Code de Justice Militaire, 1966 Semaine Juridique No. 1992, para. 31.

17. Military Penal Code art. 1(1), 3 Laws of Rep. of Korea x-82 (4th ed. & Supp. 1984).

serious civil offenses,[18] in practice not only are some nonservice connected crimes tried in the civil courts,[19] but even some clearly military offenses are tried there as well,[20] despite occasional reminders by the civil courts that military offenses should be tried by the military.[21]

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18. Defence Act, 1957, sched. 1, Military Discipline Code sec. 59 (S. Afr.).

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19. E.g., State v. Thompson, 4 [1975] S. Afr. L. Rep. 448 (Transvaal Div. 1975) (theft from civilian).

20. E.g., State v. Rouessart, 4 [1982] S. Afr. L. Rep. 250 (Natal Div. 1982) (unauthorized absence).

21. E.g., State v. Groble, 1 [1961] S. Afr. L. Rep. 63, 64 (Cape Div. 1960) (disobedience and violation of General Article); see also R. v. Russell, 11 Crim. Rep. 440 (B.C. 1951); R. v. Kirkup, 34 Crim. App. 150 (1950).

The purpose of presenting these foreign materials is to suggest, not that these are matters to be decided by a "show of hands" among the legal systems of the world, but rather that the approach adopted by this Court a generation ago is well within the experience of other nations--including some with substantial defense establishments--and, from a comparative standpoint, anything but a "sport in the law." Screws v. United States, 325 U.S. 91, 112 (1945) (plurality opinion).

B.

The Decision Below Is
Entitled to Little Deference

In Schlesinger v. Councilman, 420 U.S. 738, 760 (1975), this Court noted that the impact of an offense on discipline and effectiveness, the

distinctiveness of the military interest in deterrence, and the ability of the civilian courts to vindicate that distinct interest are "matters as to which the expertise of military courts is singularly relevant." While this language has been read by the military as holding out the promise of virtually complete deference to military courts' decisionmaking, the opinion makes clear in the very next sentence that the role allowed to military judicial expertise is instead the rather limited one of informing review in the Article III courts. If there is a place for deference, it is a narrow one.

How a deferential policy should function in a case such as this is far from clear. Here, the trial judge was a

regular officer who, in addition to being a lawyer, had long years of "line" service, including command of a ship in the Vietnam War. He conducted an extensive evidentiary hearing, and found no service connection. Presumably his decision is entitled to deference, much like the decision of a district judge on a contested issue of fact.[22] In contrast, given the disregard by the Court of Military Review and by the "bobtailed"[23] Court of Military Appeals for the constraints imposed by the clearly erroneous rule, see

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22. Cf. United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985) (sustaining trial judge's factual findings in Art. 62 appeal), citing Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

23. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 615 (1975) (Blackmun, J., dissenting).

Pullman-Standard v. Swint, 456 U.S. 273 (1982), claims that the actions of those courts are entitled to deference in this context have a decidedly hollow ring.

It is impossible to examine the decision below without having to wonder--not merely about the degree of deference it should receive, but more importantly, at the legal wilderness into which the lower courts' distorted reading of O'Callahan and Relford would, if allowed to stand, necessarily lead.

Review of the specific factors put forward in support of the decision below only confirms this assessment. For example, in opposing certiorari at this stage of the case, respondent noted that "[i]t was revealed during the trial that one of the victims had considered

suicide." Opp. at 10 n.5. It claimed that this evidence was "relevant to the issue of jurisdiction." Id. at 10 & n.5.

There is, however, literally no basis for attributing to military courts or the Court of Military Appeals any expertise that might conceivably warrant "deference" on such matters. It requires no military expertise to evaluate suicidal ideation by a child. It requires no military expertise to evaluate whether a serviceman would be annoyed, or "put off", or made to feel sad if he or she knew that a fellow-serviceman were on trial for sexual misconduct involving another member's child. These are not intrinsically military matters, and most

certainly not the stuff of deference.

What is more, they are not the stuff of jurisdiction. Indeed, that respondent would think to mention a victim's consideration of suicide as bearing on jurisdiction demonstrates better than any hypothetical how amorphous and unworkable is the approach adopted by the court below. Such an approach thoroughly undermines predictability on jurisdictional issues (the most basic question in our legal system), and inevitably leads to arbitrary results, depending on happenstances such as whether the victim is a dependent or, if so, whether he or she has suicidal tendencies or was emotionally vulnerable. Cf. United States v. Armes, supra, at 16, 41 C.M.R.

at 16 (ownership of stolen car by retired officer was "happenstance" without military significance). Why should it make a difference, in terms of jurisdiction, if a child victim was the dependent of a member of the same armed service as an accused or of another branch of the service, as the decision below may fairly be read to permit?

Finally, the proposition advanced by the Court of Military Review and relied on by respondent in opposing certiorari, Opp. at 13, that the Coast Guard's district commander in Juneau (where there is no base to speak of) had the same responsibility for the welfare

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24. It is bad enough that the legal lexicon now includes the mysterious "non-bank bank" and the even more mysterious "non-evidence evidence."

of dependents of his subordinates[24] can only be treated as implausible.

Amenability to trial by court-martial should not turn on such "illogical and fortuitous contingencies," United States ex rel. Hirshberg v. Cooke, 336 U.S. 210, 214 (1949), such as those implicit in the decision below.

C.

The Reasons Given For The Decision Below Do Not Withstand Scrutiny

Not one of the bases asserted by the Court of Military Appeals withstands serious scrutiny or represents a material change from conditions in effect when O'Callahan was decided.

Sanderlin v. United States, No. 85-5668 (D.C. Cir. July 3, 1986) (Silberman, J., dissenting), slip op. at 2 n.1. Respondent's argument would add the "non-base base."

1. The court relied on the "recent development in our society" of "an increase in the concern for victims of crimes." 21 M.J. at 254. It is clear that such an increase in concern for victims has occurred. See generally J. Stark & H. Goldstein, The Rights of Crime Victims (1985). There is, however, nothing peculiar to the military in this evolution, and nothing in the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248, cited at 21 M.J. 255 n.2, the relevance of which was neither briefed nor argued below, suggests that Congress intended it to be the fulcrum for an expansion of court-martial subject matter jurisdiction. As noted by a member of the staff of the Army's Judge Advocate General's School, "no provision of th[at]

Act affected the rights of the criminal defendant." Kaczynski, A Helping Hand: The Victim and Witness Protection Act of 1982, Army Lawy., Oct. 1984, 24, 30.

Alaska has its own legislation for the protection of victims and for their participation in the criminal and parole processes. Alas. Stat. secs. 12.55.022, 12.55.025, 12.61.010, 33.15.065 (1984).

2. The court suggested that the distraction or emotional upset associated with the potential knowledge that a servicemember had committed sexual misconduct with a child would impede others' performance of military duty. This is far too elusive a test for determining whether military jurisdiction exists. Military jurisdiction is not a

"family" affair, Opp. at 2a, whose parameters are to be decided by how distraught the victim's relatives (or, for that matter, friends) may be. Many kinds of off-base events could conceivably have an adverse impact on morale, see 21 M.J. at 256, but that is an insufficient foundation for carving an exception to the rule of O'Callahan and Relford that civil offenses should be punished by civil authorities.

3. The right to grand jury indictment is protected under Alaska law, Alas. Const. art. I, sec. 8, trial by jury is available, and (with the exception of magistrates whose criminal jurisdiction is limited to misdemeanors) Alaska's trial and appellate judges (unlike military trial and intermediate

appellate judges) enjoy the protection of a term of office. The record is clear that the Alaska offenses could have been prosecuted by the State. Similar offenses had been so prosecuted in the recent past, and the State prosecutor did not refuse to prosecute Solorio. Rather, playing "Alphonse" to the Coast Guard's "Gaston," he "deferred" to the military. But Solorio's rights under State law and the Fourteenth Amendment cannot be waived by a State prosecutor. See generally H. Moyer, Justice and the Military 197 (1972).

4. The fact that Solorio and the Alaska victims were no longer in Alaska, 21 M.J. at 257, is irrelevant. They left pursuant to military orders. The military cannot now use the

transfers--even if done in the ordinary course of business--as a basis to bootstrap the exercise of military jurisdiction over offenses that otherwise could not have been subject to that jurisdiction. Moreover, in our increasingly mobile society, State prosecutors have to deal with out-of-state defendants and witnesses every day in the week. There is nothing unusual (much less unique), therefore, in the hurdle that faced the Alaska prosecutor.

5. Similarly, the fact that witnesses might have to testify twice, or that separate State and federal rehabilitation programs might be available, 21 M.J. at 257-58, is scarcely unique to the setting of this case.

Precisely the same circumstances exist whenever an individual is prosecuted by both State and federal authorities or by two States. The military is covered by the Interstate Agreement on Detainers, 18 U.S.C. App. sec. 5 (1982); United States v. Greer, 21 M.J. 338, 340 (C.M.A. 1986),[25] one of the purposes of which is "to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future." 32 C.F.R. sec. 720.15(a) (1985); see Interstate Agreement art. I.

Congress has also directed, in Article 14(b) of the UCMJ, that delivery of a sentenced military prisoner to civil

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25. Alaska is also a party to the Interstate Agreement. Alas. Stat. sec. 33.35.010 to -.040.

authorities, "if followed by conviction, interrupts the execution of the sentence of the court-martial." 10 U.S.C. sec. 814(b)(2) (1982); see also R.C.M. 1113(d)(2)(A)(ii). The purposes of this provision are "avoiding any conflict with the concurrent sentencing of civil courts and preserving intact independent military sentencing." Edwards v. Madigan, 281 F.2d 73, 77 (9th Cir. 1960). The concern that animated the court below with respect to rehabilitation programs, therefore, is one that Congress has already addressed and resolved without the jurisdictional voraciousness implicit in the decision on review in this case.

6. The notion that the Coast Guard prosecutor might have wanted to use the Alaska offenses as evidence of other

crimes under the military equivalent of Rule 404(b) of the Federal Rules of Evidence, even if those offenses were not before the court-martial for trial, 21 M.J. at 257-58, is irrelevant to the question of service connection. Subject matter jurisdiction determines the scope of what may be proven at trial, not vice versa.

7. Finally, there is no such thing as "pendent" court-martial jurisdiction, any more than there is "pendent" district court jurisdiction over State crimes committed by an individual who has also violated some federal law. The decision below pays lip service to the point, 21 M.J. at 257, but violates it in fact. Until United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983)

(2-1), which was never examined in this Court because it was decided before Congress expanded the certiorari jurisdiction, the Court of Military Appeals had consistently honored this principle by reversing off-base portions of cases other portions of which were service connected.[26] Corrective action by this Court is necessary to nip this new and disturbing approach in the bud.

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In these times of increased concern about the arrogation of power to the Federal Government at the expense of

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26. E.g., United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); cf. Fleiner v. Koch, 19 C.M.A. 630 (1969)(mem.), noted in Justice and the Military, supra, at 179; see also id. at 178 (collecting cases); cf. R. v. Catudal, supra.

the States, this Court should be slow to approve a new rule that injects the Federal Government (and especially the military) into an area of interpersonal conduct that historically has been the responsibility of State and local authorities. Nor is it readily apparent that public policy is advanced by a rule that needlessly increases the insularity of the military. The decision below accelerates the transformation of the military and its enormous dependent community into a "khaki ghetto" ever further removed from the larger society it serves, without conferring any corresponding benefit on the military or society.

O'Callahan and Relford impose no costs on the military in terms of

discipline or otherwise. On the contrary, from a fiscal standpoint, it is fair to assume that overruling those cases would impose on the armed services additional requirements for investigative, legal, paralegal, stenographic, judicial and correctional personnel due to the increased caseload.

From a disciplinary standpoint, civil offenses, unlike, for example, violations of uniform regulations, see Goldman v. Weinberger, 475 U.S. ___ (1986), by definition do not implicate the hierarchical considerations on which the command structure rests. Regardless of the outcome of this case, many nonservice connected offenses will continue to be prosecuted by the military under the petty offense and overseas

exceptions. E.g., United States v. Holman, 21 M.J. 149 (C.M.A. 1985) (mem.), cert. denied, No. 85-963 (U.S. Jan. 13, 1986).[27] As for the remainder, once it becomes clear that this Court will not permit military and civilian authorities to negotiate away the rights of defendants, and that some offenses would go unpunished if civilian authorities decline to prosecute, it is to be expected that the kind of "deferring" attempted by the Alaska prosecutor in this case will stop.

The lines of responsibility for prosecution of civil offenses by military

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27. For serious civilian offenses, service regulations provide for administrative discharge on grounds of misconduct. 32 C.F.R. Pt. 41, App. A, sec. K(1)(a)(3) (1985).

personnel must be clear so that all who are involved will know their rights and duties, and will not be tempted to barter cases according to the shifting sands of momentary convenience or public outcry (or, as here, the lack thereof). Sexual misconduct in Juneau is the district attorney's concern, not the Coast Guard's.

The Court of Military Appeals "did not enthusiastically embrace the lessening of its jurisdiction" under O'Callahan. Willis, The United States Court of Military Appeals--"Born Again," 52 Ind. L.J. 151, 155 (1976). From the beginning, the military and its partisans complained that the decision was unwise because of the uncertainty it allegedly caused as to the contours of

court-martial jurisdiction. In fact, however, the service connection rule, particularly with the Relford gloss, quickly evolved into a well-defined set of rules.[28]

The real basis for concern over uncertainty, as it happens, is not one of unclear line-drawing, but rather the impact of extraordinary personnel

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28. The only area of uncertainty had involved off-base drug offenses, and that uncertainty has been dispelled by the Court of Military Appeals' recent decisions addressed specifically to that problem. The ACLU does not concede the correctness of the sweeping approach employed by the court below in the narcotics area, but that issue is not before the Court in this case. The Court Martial Appeal Court of Canada has also declined to embrace that approach. R. v. MacEachern, supra, at 63.

29. See generally Dep't of Defense, Office of General Counsel, Reform of the Court of Military Appeals 14-18 (1979) (discussing instability and

turbulence on a 3-member court. [29] Since 1969, 10 judges have sat on the Court of Military Appeals. In these unusual circumstances, the need for judicial restraint and adherence to stare decisis--always strong in criminal law--is unusually compelling.[30] The Court should not be misled into believing that the root of the difficulty in the decision below is inherent in either

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unpredictability due to personnel turnover).

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30. See generally Hearings on H.R. 6406 and H.R. 6298 (Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process) Before the Military Personnel Subcomm. of the House Armed Services Comm., 96th Cong., 2d sess. 54-55, 63 (1980) (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense, and Maj. Gen. Alton H. Harvey, Judge Advocate General of the Army). The need for restraint is even stronger, of course, when there is a vacancy on a 3-member court. See id. at 77, 79 (testimony of Fletcher, C.J.).

O'Callahan or Relford. It is emphatically not.

II.

BECAUSE THE DECISION BELOW OVERRULED PRIOR DECISIONS REFUSING TO PERMIT COURT-MARTIAL JURISDICTION TO BE PREDICATED SOLELY ON THE VICTIM'S STATUS AS A DEPENDENT, IT WAS A VIOLATION OF DUE PROCESS TO APPLY A DIFFERENT RULE TO SOLORIO

In addition to violating the principles of O'Callahan and Relford, the decision below is a textbook illustration of the practice of retroactive criminalization condemned in Bouie v. City of Columbia, 378 U.S. 347 (1964), and Marks v. United States, 430 U.S. 188 (1977). A statute simply cannot be reconstrued by a court to criminalize conduct previously held not to be proscribed and the new gloss applied to the very case in which the change is

announced. Hence, even if the Court of Military Appeals' expansive view of service connection were correct, Solorio's conviction as to the offenses said to have occurred in Alaska would nonetheless have to be set aside.

In opposing certiorari, respondent offered three arguments in an effort to elude Bouie and Marks. Opp. at 18-20. The first was that Solorio failed to raise the issue below. The second was that he cannot claim surprise because (a) on its face the UCMJ proscribes the conduct for which he was convicted, and (b) that conduct in any event violated Alaska law. The third was that the decision below was fairly predictable because the Court of Military Appeals "had indicated that its pre-Relford

decisions would be reconsidered in light of that case" and "had made it clear after Relford that some off-base offenses would be subject to court-martial jurisdiction." Opp. at 20, citing United States v. Lockwood, supra. None of these arguments has any validity.

1. In view of the grant of certiorari, the ACLU assumes that Respondent's suggestion that the Bouie issue cannot be raised in this Court for the first time, Opp. at 18, is "water over the dam." In any event, that argument disregards the very nature of that issue. Solorio could only have raised the Bouie issue after the Court of Military Appeals departed from its own precedent and applied the new rule to him. Since there is no duty to seek

reconsideration below as a precondition to obtaining review in this Court,[31] he cannot be faulted for failing to argue the Bouie issue in the Court of Military Appeals.

Moreover, if respondent's argument were correct, every state, federal and military defendant would be compelled to make a pro forma protective Bouie motion cautioning that the law should not be altered to his detriment. Such a request would be a remarkable waste of time and effort in the vast majority of cases, and the requirement would prove to be merely a trap for the

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31. See, e.g., Local 174, International Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 98-101 (1962); Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551-52 (1945); Southern R. Co. v. Clift, 260 U.S. 316 (1922).

unwary.

2(a). The fact that the UCMJ on its face purports to proscribe the types of conduct for which Solorio was convicted does not satisfy the requirements of due process. Like any other criminal statute, the UCMJ has developed a substantial judicial gloss which enjoys equal dignity with the words enacted by Congress. That gloss has grown up over the thirty-five years since the statute was enacted, and the fact that such a gloss would be applied was and is fully in keeping with the congressional expectation. Congress created a civilian tribunal to help develop a body of decisional law interpreting the bare legislative text. See generally Willis, The United States Court of Military

Appeals: Its Origin, Operation and Future, 55 Mil. L. Rev. 39 (1972). It is a denial of this partnership between the legislative and judicial functions[32] to limit the inquiry, as respondent would have this Court do, to the plain text of the statute. By applying the ex post facto concept to judicial decisions through the due process clauses, Bouie and Marks necessarily teach otherwise.

If, therefore, Solorio was chargeable with knowledge of the terms of the UCMJ, for better or worse, he was equally chargeable with knowledge of the judicial gloss, for better or worse. In this case, as we explain below, the gloss

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32. See, e.g., UCMJ art. 67(g), 10 U.S.C. sec. 867(g) (Supp. III 1985) (requiring annual report to Congress).

in existence at the time of the Alaska offenses was such, under Bouie and Marks, as to preclude his trial in a court-martial for those offenses.

2(b). Nor would it make a difference, for purposes of those cases, if the gloss in question were cast in terms of jurisdiction rather than as one of the "elements" of the offense. For one thing, a plurality of this Court suggested in Gosa v. Mayden, 413 U.S. 665, 673-78 (1973) (Blackmun, J.), that O'Callahan was not, strictly speaking, a jurisdictional determination. But even if it were, that would hardly render the decision below immune to the command of Bouie and Marks. As the Ninth Circuit has observed, a court cannot "make a federal crime out of acts of a defendant which

prior to that time had not been federal crimes, but acts punishable under state law." Woxberg v. United States, 329 F.2d 284, 293 (9th Cir. 1964).[33] That is precisely what happened to Solorio.

Notwithstanding the position taken in respondent's opposition to the petition, our view has only recently received confirmation from the Department of Justice. "[A]fter exhaustive research on the subject," the Department earlier this year concluded that the ex post facto clause prevents the prosecution of Yasser Arafat under a 1976 federal

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33. See also United States v. Juvenile, 599 F. Supp. 1126, 1131 (D. Ore. 1984)("retrospective establishment of federal jurisdiction violates the ex post facto clause").

34. 18 U.S.C. sec. 1116 (1982).

law[34] for the 1973 murders of the United States ambassador and charge d'affaires to the Sudan.[35] The Department's analysis relied, inter alia, on United States v. Juvenile, supra.[36]

3. Any suggestion that the decision below did not represent a substantial break from the precedents is

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35. See Letter from John R. Bolton, Assistant Attorney General, to Sen. Frank R. Lautenberg, Apr. 21, 1986; Memorandum from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, to Victoria Toensing, Assistant Attorney General, Apr. 17, 1986; Statement of Mark Richard, Deputy Assistant Attorney General before the Subcomm. on Security and Terrorism of Sen. Comm. on Judiciary, Apr. 23, 1986, at 4. (These documents will be included in Legal Mechanisms to Combat Terrorism: Hearings Before the Subcomm. on Security and Terrorism, Sen. Comm. on Judiciary, 99th Cong., 2d sess. (1986) (forthcoming).)

36. Lippe Memorandum, supra, at 8.

an "appeal to unreality." Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting). In a series of cases, three of which are cited on page 254 of the decision,[37] the court below had held that service connection over off-base civil offenses could not rest solely on the victim's status as a military dependent.[38] Indeed, in Fleiner v. Koch, supra, the court unanimously granted a writ of prohibition barring the trial of charges of indecent assault on and indecent acts

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37. United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, supra; United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

38. See also United States v. Snyder, 20 C.M.A. 102, 42 C.M.R. 294 (1970)(off-base assault and involuntary manslaughter; held, no service connection), cited in Justice and the Military, supra, at 176.

with a civilian ward in civilian premises in San Diego. The Court of Military Appeals never suggested, until this case, that its decisions in McGonigal, Shockley, Henderson, Snyder or Fleiner were not good law. As one popular summary of military law stated the rule, "the mere fact that the victim is a servicemember or a military dependent will not automatically establish service-connection." R. Rivkin & B. Stichman, The Rights of Military Personnel 21 & n.3 (1977), citing United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976).

United States v. Trottier, 9 M.J. 337 (C.M.A. 1980), was cited below for the proposition that "some of our earlier opinions on service connection

should be reexamined in light of more recent conditions and experience." 21 M.J. at 254 & n.1. It is not enough to contend, however, that earlier decisions had put the world on notice that the entire body of law on service connection was open to question and could no longer be relied on.[39] Such an approach would be the antithesis of the fair warning that is essential to the administration of criminal justice in a free society.

Trottier was a narcotics case and in no way afforded Solorio or anyone else

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39. Thus, one of the few treatises on military law noted, after Trottier, that "[w]hile the court's position on drug offenses potentially indicates an expansion of subject matter jurisdiction, it is not safe to assume that the court will endorse a wholesale readoption of per se service connection rules." D. Schlueter, Military Criminal Justice: Practice and Procedure 136 & n.8 (1982).

fair notice that the unbroken line of precedent on the precise point here in issue was no longer valid, or represented an area in which one proceeded at one's own risk, so to speak. The Trottier opinion, which was joined by only two of the judges (the third concurred in the result), went so far as to point out that "drug offenses, through their debilitating effects, have a relevance to combat readiness that rape or robbery normally do not." 9 M.J. at 346 n.22. Far from alerting the reader that sex offenses such as those of which Solorio has been convicted would fall under the same rule, such a comment clearly limited the holding and set narcotics cases aside as a special category.

Events subsequent to Trottier

confirm that the victim's status as a dependent has continued to be deemed insufficient to warrant trial by court-martial for off-base offenses that are civilian in character. For example, even after the time of the offenses of which Solorio was convicted (and while this case was wending its way through the appellate process), a Navy judge dismissed charges of off-base forcible sodomy and assault of an accused's wife. See United States v. Wilson, 21 M.J. 381 (C.M.A. 1985)(mem.). The government obtained a reversal from the Court of Military Review, but the accused appealed to the Court of Military Appeals, which granted a stay. The case was ultimately mooted when Wilson was discharged from the service, but the trial judge's action and the Court of Military Appeals' stay

can hardly be reconciled with the claim that Solorio was on notice that his conduct violated the UCMJ.

Moreover, Wilson's wife was herself on active duty with another branch of the service. That charges involving off-base misconduct against a dependent who was also literally a member of the military could be dismissed by a trial judge, and that the Court of Military Appeals would stay the trial pending disposition of the government's interlocutory appeal, calls even more strongly into question any contention that Solorio was on notice from the Court of Military Appeals' post-Relford decisions that his misconduct with a mere

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40. Respondent's assertion that "Relford held that the status of a victim as a

dependent was service connected.[40]

Finally, even the latest edition of the Manual for Courts-Martial, drafted by the Defense Department, gives no indication that the unbroken line of cases on dependent victims was in doubt. Manual for Courts-Martial, United States, 1984 at II-14 to -15. The official "Discussion" of service connection makes no reference to dependency as a factor favoring the exercise of court-martial jurisdiction, id. at II-14, para. 203(c)(5), and the corresponding

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dependent of a serviceman is an important consideration in determining whether an offense can be subject to court-martial jurisdiction (401 U.S. at 366)," Opp. at 17, is inaccurate. Neither the page cited nor the opinion as a whole stand for that proposition. Relford's crimes occurred on-base, and we suspect respondent would defend the exercise of court-martial jurisdiction even if the victims had been mere tourists visiting Fort Dix and McGuire Air Force Base.

drafters' analysis cautions that "[w]hether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in Lockwood." Id. at A21-11. Without in any way conceding that fair notice within the meaning of Bouie could have been provided by the President through the Manual for Courts-Martial, it is clear that even this type of notice was not in fact provided.

Conclusion

For the foregoing reasons, the decision of the Court of Military Appeals should be reversed and the case remanded with instructions to dismiss the Alaska specifications.

Respectfully submitted,

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